United Food and Commercial Workers Union, Local 540 (Tyson Foods) *and* Jesus Romero. Case 16–CB–193820

June 11, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On February 27, 2018, Administrative Law Judge Keltner W. Locke issued the attached bench decision and certification. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, United Food and Commercial Workers Union, Local 540, Dallas, Texas, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Telling employees it represents that it will not file grievances on their behalf because they are not union members.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Dallas, Texas facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 14 days after service by the Region, deliver to the Regional Director for Region 16 signed copies of the notice in sufficient number for posting by Tyson Foods at its North Richfield Hills, Texas facility, if it wishes, in all places where notices to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 11, 2018

_____

Mark Gaston Pearce, Member

_____

Lauren McFerran, Member

_____

Marvin E. Kaplan, Member

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(b)(1)(A) of the Act by refusing to process a grievance on behalf of Charging Party Jesus Romero.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violation found, and we shall also substitute a new notice to conform to the Order as modified.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we will not file grievances on your behalf because you are not a union member.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 540

The Board's decision can be found at www.nlrb.gov/case/16-CB-193820 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Becky Mata, Esq., for the General Counsel.

David K. Watsky, Esq. (Lyon, Gorsky & Gilbert LLP), of Dallas, Texas, for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on December 19, 2017 in Fort Worth, Texas. After the parties rested, I heard oral argument, and on February 1, 2018, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

CONCLUSIONS OF LAW

1. At all material times, the Employer, Tyson Foods, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, United Food and Commercial Workers Union, Local 540, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Respondent has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of the Employer's employees: Included: All regular full-time and regular part-time production workers, including warehousemen, shipping and receiving employees, maintenance employees, and sanitation workers. Excluded: All other employees, including the employees at the cold and dry storage facilities, laboratory service and production development technicians, quality control function, including technicians, line inspectors and inspectors, senior drafters and drafters, plant and office clerical, truck drivers, programmers and instrument technicians, and guards and supervisors as defined in the National Labor Relations Act.

4. At all material times, Respondent and the Employer have maintained and enforced a collective-bargaining agreement covering the terms and conditions of employment of the employees in the bargaining unit described above in paragraph 3. This collective-bargaining agreement includes a grievance and arbitration procedure.

5. The Respondent violated Section 8(b)(1)(A) of the Act by telling an employee seeking to file a grievance that the Respondent would not file a grievance on his behalf because he was not a union member.

6. The conduct described in paragraph 5 above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not engage in any unfair labor practices alleged in the consolidated complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended.[2]

ORDER

The Respondent, United Food and Commercial Workers Union, Local 540, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Informing employees in the bargaining unit it represents, described above in paragraph 3 of the Conclusions of Law, that it will not file grievances on their behalf because of non-membership in the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by

[1] The bench decision appears in uncorrected form at pages 120 through 134 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its offices in Dallas, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with bargaining unit employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. February 27, 2018

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

Procedural History

This case began on February 24, 2017, when the Charging Party, Jesus Romero, filed the initial charge in this proceeding against the Respondent, United Food and Commercial Workers Union, Local 540. He amended that charge on August 1, 2017.

On September 22, 2017, after investigation of the charge, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

The Respondent filed a timely answer.

On December 19, 2017, a hearing opened before me in Fort Worth, Texas. The parties finished presenting their evidence that day, and I adjourned the hearing. It resumed by telephone on January 30, 2018 for oral argument. I then adjourned the hearing until today, February 1, 2018, when it resumed by telephone for this bench decision.

Admitted Allegations

The Respondent has admitted the allegations in complaint paragraphs 1, 2, 3, 4, 5, and 6 and, based on those admissions, I find that the General Counsel has proven the allegations raised therein. More specifically, I find that the Charging Party filed and served the charge as alleged.

Further, I find that at all material times, Tyson Foods, which I will refer to as the "Employer," has been a corporation engaged in the processing and nonretail sale of food products, with an office and place of business in North Richland Hills, Texas. At all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Additionally, based on the admissions in the Respondent's answer, I find that at all material times the Respondent has been and is a labor organization within the meaning of Section 2(5) of the Act, that steward Jose Segovia and steward Odilon Hernandez have been its agents within the meaning of Section 2(13) of the Act, and that, by virtue of Section 9(a) of the Act, it has been the exclusive collective-bargaining representative of the following employees of the Employer:

> Included: All regular full-time and regular part-time production workers, including warehousemen, shipping and receiving employees, maintenance employees, and sanitation workers.
>
> Excluded: All other employees, including the employees at the cold and dry storage facilities, laboratory service and production development technicians, quality control function, including technicians, line inspectors and inspectors, senior drafters and drafters, plant and office clerical, truck drivers, programmers and instrument technicians, and guards and supervisors as defined in the National Labor Relations Act.

Further, based on the admissions in the Respondent's Answer, I find that at all material times, the Respondent and the Employer have maintained and enforced a collective-bargaining agreement covering the terms and conditions of employment of this bargaining unit, and that this agreement includes a grievance and arbitration procedure.

Contested Allegations

Complaint Paragraph 7

Complaint paragraph 7 alleges that on about February 22, 2017, the Respondent, by Jose Segovia, told Jesus Romero that the Union would not assist him because he was not a union member. The Respondent has denied this allegation. The Respondent also has denied that it thereby violated Section 8(b)(1)(A) of the Act, as alleged in Complaint paragraph 9.

Charging Party Romero began working for the Employer in October 2002. In August 2016, the Employer suspended him for violating its "lock out/tag out" policy, which was part of its "Core Safety Mandate." The suspension notice informed him that a future violation could result in further disciplinary action up to and including discharge.

At the time of his discharge in February 2017, Romero was working as a leadman. The complaint does not allege and the

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

record does not establish that Romero possessed supervisory authority, as described in Section 2(11) of the Act, and I conclude that he did not. However, in the course of his work he did give instructions to certain other employees.

Some of these employees informed management that Romero had told them not to "lock out" their machines. Presumably, he gave this instruction to speed up production, but it violated the Employer's safety policy. Concluding that this was Romero's second violation of the "Core Safety Mandate," management decided to discharge him.

Union steward Odilon Hernandez testified without contradiction that a representative of the Employer's human resources department called him to a meeting at which the complaining employees were present. The human resources representative told the steward that management intended to discharge Romero and asked him to be present during the discharge interview.

Hernandez did attend the meeting, on about February 22, 2017, at which management informed Romero of the decision to terminate Romero's employment. Neither during nor after this meeting did Romero ask Hernandez to file a grievance over the discharge.

Romero left the plant but later that same day returned to the parking lot. He had another individual contact union steward Jose Segovia, who then came to the parking lot to speak with Romero.

During Segovia's discussion with Romero, two other employees also were present. One was Jaime Bonilla, who appeared as a witness in this proceeding. The other was Pedro Velasco, who did not testify.

Romero testified that he told Segovia that he wanted to file a grievance concerning his discharge and that Segovia replied that he could not, because he was not in the Union. Bonilla corroborated that testimony:

> Q: BY MS. MATA: Mr. Bonilla, who also was present at that table besides Mr. Romero and Mr. Segovia?
> A. Mr. Pedro Velasco.
> Q. What happened at the end of that conversation?
> A. Mr. Segovia commented to me that -- to me and Pedro, that he didn't help those that were not in the Union because he didn't want to have problems with Juan.
>
> Q. And he directed these comments toward you?
> A. To both of us.

Steward Segovia denied telling Romero that he could not file a grievance because he was not a union member. In Segovia's account, Romero told him that he had been discharged because of "accusations" by a fellow employee or employees.

In discussing Segovia's testimony, it may be noted that he, and all the other witnesses, testified in Spanish, and that the written record consists of the translation into English by an interpreter. There are occasional quirks of grammar or syntax which sometimes impair clarity. For example, Segovia testified that Romero told him that the accusations leading to Romero's discharge were made "by the woman working at the line." That would imply that only a single employee complained. However, Segovia's testimony concerning what he said in reply suggests that more than one person had complained:

> Q. And what did you say?
> A. I told him if he had contacted Enrique Flores, his [Indiscernible] or Herman Flores who are his supervisors, that there were fake accusations, that why were they being believed.
>
> Q. And what did he say?
> A. That for me to file a grievance.

According to Segovia, he told Romero that he, Segovia, would call union representative Juan Ventura. Segovia unequivocally denied telling Romero that he could not file a grievance because Romero was not a union member:

> Q. Okay. Did you ever say, "I can't file a grievance for you because you are not in the Union?"
> A. No. I told him that this was a very hard case, that I needed to talk with somebody that was above me, in this case Juan, so that he could make an investigation. I even offered him Juan's number to talk with -- so that he could talk with Juan. I told him that I was going to talk to Juan about Jesus Romero and I did that.

The record thus presents a conflict in the testimony which must be resolved. In these circumstances, testimony by Pedro Velasco would have been quite helpful. The General Counsel did not state whether or not an effort had been made to locate this potential witness and did not offer any explanation for his absence.

One question which may bear on credibility is why Romero did not tell the other union steward, Hernandez, that he wanted to file a grievance concerning his discharge. The record clearly establishes that Hernandez was present during the discharge interview and that Romero did not, at any time, ask Hernandez to file a grievance. Romero testified that he asked steward Segovia, rather than steward Hernandez, to file the grievance because Segovia "explained things better. He's — he gets himself to understand."

According to Segovia, when he asked Romero if he had contacted Hernandez, Romero replied that he, Romero, had been told that Segovia could file the grievance for him. Such a response, like Romero's testimony that Segovia "explained things better," does not shed much light on Romero's motivation for going to Segovia.

Segovia did, in fact, contact union representative Juan Ventura. This action is consistent with Segovia's testimony that he told Romero that he was going to talk with Ventura about Romero's discharge. This consistency weighs in favor of crediting Segovia's testimony.

Additionally, the fact that Segovia did contact Ventura about Romero's discharge undercuts, to a slight extent, the testimony that Segovia refused to file a grievance because Romero did not belong to the Union. It may be asked, if Segovia had refused to file a grievance, then why would he have called the union representative?

However, these concerns do not outweigh the fact that two witnesses testified that Segovia told Romero he could not file a grievance because he was not a union member. The record suggests no reason why the corroborating witness, Bonilla, would fabricate testimony. Accordingly, crediting Romero and Bonilla, I find that Segovia did say that Romero could not file a grievance because he was not a member of the Union.

The Union has admitted that Segovia is its agent. Therefore, Segovia's statement to Romero is imputable to the Union.

If a union is the exclusive representative of a bargaining unit, as is the case here, it may not lawfully tell a unit employee that it will not process the employee's grievance because the employee is not a union member. *Oil Workers Local 3–495 (Hercules, Inc.)*, 314 NLRB 385 (1994).

Accordingly, I recommend that the Board find that the Union violated Section 8(b)(1)(A) by the conduct alleged in Complaint paragraph 7.

Complaint Paragraph 8

Complaint paragraph 8(a) alleges that since about February 22, 2017, the Union has refused to process Romero's grievance concerning his discharge. Complaint paragraph 8(b) alleges that it so refused because of Romero's nonmembership in the Union. The Respondent has denied these allegations. It also has denied the allegation in Complaint paragraph 9 that such conduct violated the Act.

On February 23, 2017, union representative Juan Ventura received a telephone call from steward Segovia, who described his conversation with Romero. Ventura testified, credibly and without contradiction, that he told Segovia "we were going to investigate the merits of what had happened to Mr. Jesus Romero during his termination."

Ventura then contacted Ruby Reyes, an official in the Respondent's human resources department. Ventura credibly testified that he met with Reyes at the plant:

> Q. And what did he say to you? What did he say happened?
> A. He explained to me that it was due to the safety policy of the Company. He showed me testimony of the people that were accusing Mr. Romero. I asked him for copies of everything in reference as to what led the Company to terminate Mr. Romero.
>
> Q. And did he give you everything?
> A. Yes.
>
> Q. And did that include all of the statements?
> A. Yes.

After reviewing the documents, Ventura decided that a meritorious grievance could not be filed. He informed Segovia of this decision but did not contact Romero. Additionally, the record does not establish that Romero either contacted or tried to contact any union official except steward Segovia, and I find that he did not.

Ventura's testimony is uncontradicted and the record provides no basis for doubting it. Moreover, the record does not disclose any instance in which the Union filed or processed another employee's grievance concerning a discharge under similar circumstances. Additionally, there is no evidence of improper motive except for steward Segovia's statement to Romero.

Nothing in the record indicates that steward Segovia informed union representative Ventura that he had told Romero that the Union would not file a grievance on Romero's behalf because of Romero's nonmembership. Moreover, the record does not indicate that Segovia had any further involvement in the matter after his telephone call with Ventura, and I find that he did not. To the contrary, I conclude that Ventura alone made the decision not to file a grievance on Romero's behalf.

It also may be noted that the record does not establish that the Union failed to file a grievance for any other unit employee because that employee was not a union member.

Crediting Ventura's testimony, I find that the Union decided not to file a grievance on behalf of Romero because of its good faith decision that such a grievance would not be meritorious and could not be won. Further, I find that Romero's nonmembership in the Union did not enter into Ventura's decision-making process.

So long as it acts in good faith, a union has a wide range of reasonableness in determining whether to file and pursue a grievance on behalf of a bargaining unit employee. *Union de Obreros de Cemento Mezelado (Betteroads Asphalt Corp.)*, 336 NLRB 972 (2001). Moreover, a union, in exercising the "wide range of reasonableness" accorded it in representing the bargaining unit, need not satisfy the Board that the choices it makes are better or more logical than other possibilities. *Reading Anthracite Company*, 326 NLRB 1370 (1998).

Here, I conclude that the Respondent acted in good faith and within its wide range of reasonableness. Further, I conclude that it was not motivated by Romero's status as a nonmember. Therefore, I recommend that the Board find that the Respondent did not violate the Act by failing and refusing to process a grievance on Romero's behalf.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell an employee in a bargaining unit we represent that we will not file a grievance on behalf of that employee because of nonmembership in the Union.

WE WILL NOT, in any like or related manner, restrain or coerce bargaining unit employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL represent all bargaining unit employees regardless of membership or nonmembership in the Union.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 540 (TYSON FOODS)

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/16-CB-193820 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.